IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1746 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-Yes.**

2 To be referred to the Reporter or not ? **-Yes.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

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SHRI CHHAGANBHAI BHURABHAI VAGHELA-KOLI - Applicant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR HR PRAJAPATI for Applicant(s) : 1,MR MR PRAJAPATI for Applicant(s) : 1,
NOTICE NOT RECD BACK for Respondent(s) : 1,
RULE SERVED BY DS for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 27/12/2005

ORAL JUDGMENT

1.Chhaganbhai Bhurabhai Vaghela-Koli, petitioner has filed this petition under Article 226 and 227 of the

Constitution of India with a prayer that this Court may be pleased to issue writ of mandamus for quashing and setting aside the impugned order dated 25/5/2005 passed by the Sub Divisional Magistrate, Amreli, respondent no.2 under Section 56(a)(b) of the Bombay Police Act, 1951, externing the petitioner for a period of two years which has been confirmed by the Deputy Secretary, Home Department, New Sachivalaya, Gandhinagar, respondent no.1 vide its order dated 23/11/2005 as being illegal, invalid, null and void, suffers from total non-application of mind, without authority of law, against the principles of natural justice and violative of Articles 14, 19 and 21 of the Constitution of India. Petition has been filed on 8/12/2005.

2. This Court has issued Rule on 13/12/2005. Rule has been made returnable. Therefore, the same has come up for final hearing to this Court today.

3. Mr.H.R.Prajaptai, learned advocate for the petitioner has stated that though there are several grounds, he desires to raise only one ground in this behalf. He has stated that show cause notice, issued by the

authority which has been received by the petitioner somewhere in December 2004. The show cause notice mentioned several cases. Out of that one case mentioned is criminal case no.40 of 1999. According to the authority, it is pending on 21/9/1999 under the provisions of IPC. In reply to the said show cause notice, dated 21/2/2004, petitioner has specifically pointed out that the aforesaid case had been committed to the Sessions Court and in that Sessions Case No. 29 of 2000, the learned 3rd Fast Track Court Judge, Amreli by his judgment and order dated 21/2/2004 pleased to acquit the petitioner under the provisions of Section 143, 147, 307 of IPC read with Section 135 of the Bombay Police Act. It is the case of the petitioner that though the said fact has been categorically set out in the reply to the show cause notice, the authority has passed the order without considering the said reply in this behalf and in fact stated that the said case is pending and passed impugned order on 25/5/2005 after relying upon the said case.

4. The learned advocate for the petitioner has stated that in view of the facts and circumstances of the case, when in show cause notice, mentioned about the criminal

case No.40 of 1999 pending against the petitioner. In reply to the said show cause notice, the petitioner has specifically pointed out that the aforesaid case had been committed to the Sessions Court and in the said case 29 of 2000, the learned Judge by his judgment and order dated 21/2/2004 pleased to acquit the petitioner under the provisions of 143, 147, 307 of IPC read with Section 135 of the Bombay Police Act. Though the said facts are specifically set out in the reply, in the order dated 25/5/2005, which has been passed by the authority, the authority has not considered the said fact in this behalf and even in the affidavit in reply which has been filed by the authority, the said facts are not considered. In amendment to the petition it has been specifically stated in ground (F) that the aforesaid case has been decided. However, in the impugned order of externing authority, it has been shown that the said case is pending. The said ground has been taken in para 10(f). When we see the affidavit in reply, in para 11 of the same, the deponent of the affidavit has stated that “I say that proper reading of the judgment in the said case makes it very clear that most of the witnesses in that case turned hostile to the case of the prosecution hence

petitioner has got benefit of doubt. Therefore the contentions raised by the petitioner in not tenable at law."

5. The learned counsel has submitted that if the authority did not apply their mind to the facts and circumstances of the case, then order of authority is liable to be quashed and set aside. For the same, he has relied upon the Division Bench Judgment of this Court in the case of Suleman Husa Devji v. State of Gujarat and another, reported in 1989 (1) GLR 101, particularly para 4 at page 103 which is as under:

> "From the foregoing discussion, it is clear that the externing authority has not applied its mind to a very relevant circumstance, which would have shown that witnesses are forthcoming for the purposes of giving evidence against the petitioner. On the other hand, the externing authority has mechanically applied its mind and has wrongly stated that the case registered at Crime Register No.58 of 1986 is pending trial. The fact clearly reveals that the said Crime Register No.58 of 1986 was tried by the Court and the petitioner has been acquitted in that

case. This is a clear case of non-application of mind by the externing authority and it also spells out the mechanical way in which the externing authority has passed the order of externment. This single instance itself it sufficient to quash the order of externment. In view of this glaring mistake committed by the externing authority, it is not necessary for us to go into the other contentions such as failure of natural justice, mala fides and denial of opportunity to hear the witnesses."

6.I have considered the facts and circumstances of the case. It is clear that in this case, the authority has issued show cause notice, pointed out that criminal case is pending. Though the petitioner has specifically replied that the case is decided the authority has shown that the said case id pending. When in affidavit which has been filed, said ground has been taken and in affidavit, a very vague reply has been given.

7.In my view the contention of the petitioner is required to be accepted and the same is covered by the judgment

of Suleman Husa (supra).

8. I have considered all the facts and circumstances of the case. In view of the aforesaid provisions of the Bombay Police Act and also judgment of the Division Bench, it appears that an order of externment has the necessary consequences of restricting the movement of a citizen. This restriction can be imposed only by proceeding in accordance with law. The law on the subject is that prior to the passing of an order of externment show-cause notice should be issued disclosing specific grounds on which an order for externment is proposed to be passed. If vague grounds are given in the show-cause notice, it will certainly prejudice the petitioner in effectively raising his defence. The next stage is that if, after the receipt of the show-cause notice, the cause is shown and the defence is tendered by the proposed externee, the same is bound to be considered objectively by the externing authority as well as by the Appellate Authority.

9. In my view the authority i.e. externing authority as well as appellate authority certainly acting as quasi-judicial authorities, hence, these orders should not be

purely subjective, rather objectivity should be reflected in these orders. In case evidence is adduced by the two sides it should be objectively considered and reasons should be given why evidence of one side is believed and the evidence of the other side is not believed. If the orders are passed after complying with these formalities, then certainly it can be said that procedural safeguards were observed by the two authorities. In all events, violation of these safeguards will certainly render the impugned orders invalid.

10. It may be noted that petitioner has also raised other grounds. The authority has also considered some of the causes which does not relates to chapter-5 but the same is of the chapter-8 of the IPC. These are additional grounds.

11. In view of the facts and circumstances of the case, only on the ground that the authority has not considered the reply filed by the petitioner and therefore the objectivity of the order has been passed and therefore the order is liable to be quashed and set aside.

12.In the result, petition is allowed. Order of externment dated 25/5/2005 is quashed and set aside and order dated 23/11/2005, confirming the order of externment is also quashed and set aside. Rule is made absolute with no order as to costs. Direct service is permitted.

(K.M.MEHTA, J.)

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